On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY OF PETITIONERS TO THE BRIEF OF THE BITUMINOUS COAL OPERATORS ASSOCIATION, AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 1179

GEORGE RAMSEY, LEON NUNLEY, d/b/a LEON NUNLEY COAL COMPANY; PAUL GIBBS, d/b/a PAUL GIBBS COAL COMPANY; LOIS HALL TRAVIS, Administratrix of the Estate of W. J. Travis and J. H. GRAHAM, d/b/a NINTH WEST COAL COMPANY; A & R COAL COMPANY, INC.; W. T. MORRISON and J. H. GRAHAM, d/b/a M & G COAL COMPANY; J. H. GRAHAM COAL COMPANY, INC.; W. T. MORRISON and LOIS HALL TRAVIS, Administratix of the Estate of W. J. Travis, d/b/a M & T COAL COMPANY; STEPHENSON BROTHERS COAL COMPANY, INC.; EDWARD NUNLEY d/b/a EDWARD NUNLEY COAL COMPANY; EAST VALLEY COAL COMPANY, INC.; ELLIS WARD and LON L. VARNELL, d/b/a TRACY CITY COAL COMPANY; HENRY WILLIS FLYNN, d/b/a WILLIS FLYNN COAL COMPANY; H. W. FLYNN COAL COMPANY, INC.; HOWARD HIGGINS, d/b/a HOWARD HIGGINS COAL COMPANY; HOWARD HIGGINS COAL COMPANY, INC.; MARSHALL MEEKS; TENNESSEE PRODUCTS AND CHEMICAL CORPORATION,

Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,

Defendant.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY OF PETITIONERS TO THE BRIEF OF THE BITUMINOUS COAL OPERATORS ASSOCIATION, AMICUS CURIAE

WHO BCOA IS

Bituminous Coal Operators Association (herein referred to as "BCOA") is the association with which United Mine Workers of America (herein referred to as "UMW") has negotiated the successive amendments to the national collective bargaining agreement in the bituminous coal industry since 1950. This association represented only a part of the companies in the industry but the national agreements between UMW and BCOA were applied industrywide.

THE EXPRESSED INTEREST OF BCOA IN THIS CASE

This BCOA has filed a brief in this case as Amicus Curiae with the expressed interest of seeking to preserve "the legality and integrity of the National Bituminous Coal Wage Agreement and the procedures established and utilized by BCOA" (BCOA Brief, page 2). BCOA says it is vitally interested in seeing that there be no use or "consideration by this Honorable Court of the so-called 'effects and consequences'" of the UMW-BCOA course of conduct as "the launching pad for claims and/or adjudications of antitrust conspiracies" (BCOA Brief, page 3).

THE CONTENTIONS OF THE BCOA BRIEF

The two parts of the argument in the BCOA brief are, first, "it is erroneous and misleading to contend that BCOA is an association organized and controlled by a few companies" (BCOA Brief, page 8), and, second, "general labor peace in the industry since 1950", "increase in wage levels and welfare benefits as a result of collective bargaining since 1950", and "failure of the union to oppose mechanization", are effects and consequences which

"are generally the product of collective bargaining" and are "the normal consequences of the system of collective bargaining which is endorsed and encouraged by the National Labor Relations Act" (BCOA Brief, page 8).

THE BCOA BRIEF DOES NOT DEAL WITH THE THREE QUESTIONS PRESENTED BY PETITIONERS IN THIS CASE

It is submitted that the foregoing is a true synopsis of the full contentions made in the BCOA brief. Its failure to reach and to meet the three questions presented in petitioners' brief are manifest. Of course we can agree that BCOA is interested in preserving its position as the agency for fixing the terms for the whole industry. But the Amicus Curiae brief skirts around the real issues in this case.

BCOA says that the effects and consequences of UMW-BCOA conduct should not be considered, and the brief proceeds to discuss only the three matters relating to collective bargaining specified at page 8 of the brief as if those were the only matters argued by petitioners. But the brief never gives attention to the consequences (the plainly intolerable consequences) visited upon the Southeastern Tennessee coal fields. Rather, at the bottom of page 3, the brief says it is not interested in such things as those pertaining to Southeastern Tennessee "since BCOA is in no way involved in those issues". Neither does BCOA mention the repressive effects and operating losses suffered by the industry as a whole under the contract while a few major companies prosper.

The BCOA brief never mentions the finding of the trial court that on the preponderance of the evidence in this case there was extracted from UMW an implicit agree-

ment that the BCOA contracts would be applied industry-wide, which is the point of petitioners' first question; nor does the BCOA brief deal with the legal effect of the express language of the protective wage clause which is the point of the petitioners' second question. Rather BCOA says at page 5 "BCOA does not intend to discuss herein the language of the National Bituminous Coal Wage Agreement or the various amendments thereto."

What analysis of statutory law there is in the BCOA brief never extends beyond consideration of the National Labor Relations Act, and does not mention the policies of the Sherman Act or the National Employment Act. In considering the right of the UMW-BCOA unit to engage in free bargaining under the labor law, no consideration at all is given to the right of the hundreds of other units of the industry to free bargaining under the labor law, a right which indisputably has been destroyed by the UMW-BCOA pattern of bargaining. So BCOA misses contact with petitioners' third question in this case.

In fact BCOA has missed replying to all three questions raised by petitioners.

BCOA ASKS WHAT IT COULD HAVE DONE TO LIFT THE CLOUD OF SUSPICION FROM THE DEALINGS WITH UMW. THE ANSWER IS OBVIOUS.

Perhaps the main point of the BCOA brief is leaving the impression that, really, there is nothing else that could have been done in this industry than what BCOA and UMW have done in their agreements. BCOA says at page 13:

> "Petitioners do not enlighten us as to how the coal operators should conduct these contract negotiations in such a way as to lift the cloud of suspicion from the

contract negotiations. Presumably, however, this could require the abandonment by coal operators of association-type bargaining...."

In reply to this we refer to the record wherein there is given a good example of the kind of association-type bargaining efforts that could and should have been carried on in such a varied industry as bituminous coal. We refer to the unsuccessful efforts of Sewanee Coal Operators Association of Southeastern Tennessee to negotiate with UMW representatives which effort is described by the trial court at 140a-141a, and described by witnesses at 540b-551b, and 1255b-1258b.

The Sewanee Association was made up of various kinds of mines, some larger than others, some hand-loading, some semi-mechanized and some fully mechanized. The fully mechanized mines with much higher productivity per man recognized that the mines with lower productivity should not be required to pay (and could not possibly pay) the same scale of wages as they paid, even though they were directly competing on the same market. Different wage scales were designed and offered based on productivity and mining methods.

So this is our suggestion to BCOA, since they have asked for it. To make association-type bargaining successful and not result in anticompetitive repression, all that is needed is some spirit of fair play and mature sense of responsibility on the part of those companies operating under the most productive conditions, which companies generally are the most powerful group in an association. There must be a realization that flat increases in wages across the board can come from only two sources—(1) increased productivity or (2) increased prices that make an inflationary spiral. There must be a realization that

such flat increases in wages across the board, constantly and repeatedly applied, for any one company in the association, or any one bargaining unit outside the association, can be met only by increased productivity, unless prices go up. If that one unit has found it impossible to change its production methods and if prices stay the same that unit will inevitably be forced out of business. And on the record discussed in our main brief this plainly could and has happened to the bulk of the bituminous coal industry.

So we suggest to BCOA that it consider these very elementary economic principles and ask its most powerful members to allow *reasonable* departure from the rigid single scale that has been tailored to fit the advantages of those companies as discussed in our main brief. In other words, let the big companies have a little consideration, the same spirit shown by the larger companies of Southeastern Tennessee in the Sewanee Association. Take out the contract language and understandings that restrain the bargaining freedom of other units. Let the UMW return to its traditional policies of equal work opportunity and consideration for reasonable competitive equality, policies which were dominant in UMW before the formation of BCOA, as discussed in our main brief.

If BCOA cannot break the control of major companies who refuse to allow reason to prevail, then all statutory policy requires that BCOA and its dominant companies stand to answer for the inevitable consequences.

THE AMICUS CURIAE BRIEF OF BCOA ATTEMPTS TO REVAMP THE THEORY OF PETITIONERS TO MAKE IT LOOK RIDICULOUS

As we pointed out in our main brief, opposing counsel have attempted to rephrase the conspiracy theory of the petitioners, using language that is plausible on its face, in an effort to make the theory of petitioners look ridiculous.

BCOA has adopted the same policy. As an example on pages 17-18 of the BCOA brief it is said:

> "Petitioners make certain assumptions which are not valid. To begin with, it is assumed that mechanization in the coal industry began only in 1950, at or about the time that the alleged conspiracy is claimed to have begun. However it is submitted that mechanization programs in the coal industry started long before 1950 and they are continuing and will continue in the future under the compulsion of economic necessity. It is also assumed that the union, allegedly acting in concert with BCOA, began to encourage mechanization only after 1950."

Of course our theory goes to the intensity of mechanization made absolutely mandatory under the UMW-BCOA agreements since 1950. The wheelbarrow was invented before 100 A.D. in China and it has probably been used in the mines since the first coal mine was opened. But the effect of the flat-wage increases across the board since 1950 is reflected in the industry's statistics. There has been a revolution in the machinery used in the mines since 1950. The result is reflected in such exhibits as defendant's Exhibit 395 (1023a). This exhibit shows that in the period before 1950, the tons per man per day produced by the coal industry in 1940 was 5.19 tons. By 1950

this had increased only to 6.77 tons, or an annual increase for that whole decade of only .16 tons per man per day for each year even with the pressure of World War II. Contrast that advancing mechanization with what happened in the next decade. The industry increased its average productivity from 6.77 per man per day in 1950 to 12.83 tons per man per day in 1960, or an average annual increase of .6 tons per man per day for each year of that decade. And further, contrast what was going on before 1950 with what has happened in the early years of the 1960's. The industry increased its productivity from 12.83 tons in 1960 to 16.84 tons in 1964 or an average annual increase of over 1 ton per man per day in those four years.

So the Court can see that, while the statement above from the BCOA brief may sound plausible, it makes absolutely no sense in the face of the real contentions and the real facts in this case.

With respect to the last part of the foregoing quoted statement from the BCOA brief to the effect that UMW was not opposing mechanization before 1950, we have already answered that sort of subtle revamping of our case in our main brief starting at the bottom of page 29 and on page 30. There we said:

> "When UMW says that historically UMW has never opposed mechanization, this is an implication that petitioners' theory is that UMW suddenly stopped opposing mechanization in 1950. This a subtle revamping of our case to cause our theory to look somewhat unreasonable and to avoid discussing the real change which is so clear on the record. No union could officially oppose mechanization or any other kind of progress without outcries of 'feather-bedding' and

strong public reaction. And we did not contend that UMW opposed mechanization before 1950 and stopped doing it after 1950.

"What we did say is that before 1950 UMW had a much discussed policy of seeking to preserve working opportunities for all of its members—not just those who worked for a big mechanized mine. And the union permitted differentials to stand if needed to keep men in jobs. Its primary concern before the 1950 contract was the growing disparity in work opportunity among its members."

Reference to our Statement of Facts demonstrates clearly that the foregoing statement is absolutely true. UMW's primary concerns and policies before 1950, from its own records, indisputably were equal working opportunities for all members and reasonable competitive equality among producers. These policies have clearly been abandoned since BCOA was organized in 1950.

BCOA WAS ORGANIZED AND CONTROLLED BY MAJOR COMPANIES

One of the main purposes served by the BCOA brief is to create the impression that BCOA is a democratic organization representing large and small companies equally, that there are major companies in the industry which are not members of, and have no relationship to, BCOA and its policies, and that such major companies and the rest of the industry are not under the sway of BCOA's dictates and policies. The brief says at page 8 that "it is erroneous and misleading to contend that BCOA is an association organized and controlled by a few companies." The first part of BCOA's argument is devoted to the foregoing propositions.

The record establishes the dominance of major companies over BCOA policy and the dominance of BCOA over the industry.

The main brief of petitioners at pages 38-47, with appropriate references to the record, shows that the proof in this case establishes that BCOA was organized by Mr. George Love after discussions with Mr. Harry Moses. Mr. Love was the head of the largest company in the industry, Consolidation Coal Company, and he got Mr. Harry Moses to take over the leadership of BCOA (254a; 432a; 817a-818a). It was their decision that there should be some change in the bargaining procedures in the industry and this was their decision and not the decision of the union (609a; 625a-627a). The two-man bargaining teams that were organized by the head of BCOA and the head of UMW were publicly described and acknowledged by these men (431a-434a; 298a; 627a). Consolidation Coal Company always had one of its officers on the three-man advisory committees prompting the head of BCOA in the bargaining sessions with UMW (480a; 621a).

The record clearly establishes that the choice of the rest of the industry was to sign the one and only UMW-BCOA contract or suffer the dire consequences (181a; 315a; 669a). UMW's own witness, Secretary of the Illinois Coal Operators Association which included the second largest company in the industry, testified how that association was in and out of BCOA seeking some independence from BCOA but found that under the BCOA-UMW pattern of bargaining it could obtain no freedom of action other than the choice of the one and only national contract (865a-877a).

There is no real dispute in this record to the proposition that the major companies, particularly the largest

company, Consolidation Coal Company, organized the BCOA, dominated its leadership, and deprived the rest of the industry of any freedom of action with respect to collective bargaining. There is no dispute in this case that it was the head of BCOA, working with Illinois Coal Operators Association and Southern Coal Producers Association who demanded and obtained the restraints contained in Paragraph A of the Protective Wage Clause that restrained UMW in its bargaining relationships with the rest of the industry (883a-884a; 942a-944a; 1016a-1018a; 1021a; 1028a-1029a).

EVEN IF THE BCOA ARTICLES OF ASSOCIATION AND THE MINUTES OF MEETINGS TO WHICH THE BCOA BRIEF REFERS WERE FULLY IN EVIDENCE THEY WOULD NOT SHOW FAIR REPRESENTATION BY BCOA OF ALL MEMBERS AND ALL UNITS IN THE INDUSTRY

At pages 6 and 7 the BCOA brief quotes from the BCOA Articles of Association (which are not in the record) as to its purposes to "promote stable, just and harmonious industrial relations" and to negotiate collective bargaining agreements for its members. The brief says there is flexibility in negotiations provided by the BCOA articles and states that "since each negotiation has different characteristics, many of the procedures utilized, such as the appointment of study committes and the like, are ad hoc and vary each time negotiations are entered into." The brief stresses the articles which specify for whom BCOA shall bargain and that is the "members of BCOA" including the smaller members.

These matters are not in the record. But their use here as undisputable propositions to create the impression that BCOA engages in fair and impartial negotiations

accompanied by thorough and dispassionate consideration of the interests of all members by various impartial "ad hoc" committees, cannot go unchallenged.

A part of the BCOA articles and minutes of meetings were in evidence in a case tried in January, 1970 styled ***Blue Diamond Coal Company v. United Mine Workers***, Civil Docket No. 6189 in the United States District Court for the Eastern District of Tennessee, Northern Division. In that case the jury found (1) that UMW had conspired with major companies in violation of the Sherman Act, but (2) the plaintiff (***Blue Diamond***) had not been injured in its business or property by reason thereof. There was no appeal. But the matters hereinafter stated are in the record contained in that case.

The BCOA articles and minutes show that Mr. Love of Consolidation Coal Company was empowered by the articles to, and he did in fact, call the first meeting of members and that he did serve as chairman until he obtained Mr. Harry Moses as president. It is disclosed that the articles provide that the number of votes of members is determined by their respective size of production or annual tonnage, and at the organizational meeting of July 11, 1950 the officers and directors of Consolidation Coal Company (representing not only the tonnage of that company but also the tonnage of other member companies and associations) together with the representative of Mr. Harry Moses' company (the United States Steel Subsidiary, H. C. Frick Coke Company) had over half the tonnage represented, and thus had over half the votes.

If there were small members of BCOA who, like the Southeastern Tennessee companies, could not comply with national contract terms fixed by BCOA, it goes without saying, on the record in this case, they were not being fairly and evenly represented.

EVEN IF THE COLLECTIVE BARGAINING PRACTICES OF OTHER UNIONS AND OTHER INDUSTRIES REFERRED TO BY THE BCOA BRIEF WERE IN THE RECORD IN THIS CASE, THEY WOULD NOT HAVE THE ANTICOMPETITIVE CHARACTERISTICS OF THE UMW-BCOA PATTERN OF BARGAINING

At page 16 the BCOA brief says that the existence of some operators in the industry who cannot pay the single contract demanded by UMW-BCOA "provides no proper basis for an antitrust violation" and the brief adds a broad conclusory statement about the governing law and about facts which are not found in this record, saying:

> "This is an unfortunate economic condition and a fact of life which exists in all industries, and is some perhaps to a greater extent than others. Unions, in presenting and pursuing their bargaining goals in a particular industry, are not required to, and normally do not, take into account the ability to pay of financially weaker business units, but traditionally center their aims on the larger and more stable enterprises in the industry. By the same token, the more stable employers have had little success in resisting union wage and other economic demands on the grounds that less stable employer units cannot afford to meet union standards."

Thus BCOA comes in as Amicus Curiae with a rather broad unsupported conclusion as to the law governing union responsibility in good faith bargaining—saying, in effect, the union has no responsibility other than to deal with the strongest companies. But the allegation goes further than that. It asserts as a factual proposition that all unions are doing the same thing that UMW is accused of

doing—making contracts with which only the strongest companies can comply and paying no attention to the inabilities of the bulk of the industry units to pay the terms demanded of them.

Even if other unions were shown in the record to be doing this, it is still wrong. It still violates labor, antitrust and employment statutory policies clearly expressed by Congress.

But we challenge the factual statement made. We do not think that any other industry has had the history of the extreme distress, ruin and economic deprivation for some, contrasted with rapidly growing profits for others, which has characterized the coal industry and those areas which have been traditionally tied to the coal industry.

THE BCOA FAILS TO SHOW THE COURT THE ANTICOMPETITIVE INTEREST OF BCOA IN THE INCLUSION OF THE PROTECTIVE WAGE CLAUSE IN THE NATIONAL CONTRACT, WHICH INTEREST IS MUCH MORE FULLY DISCLOSED IN FEDERAL CASES SINCE THE TRIAL OF THIS CASE IN 1965

It is said in 4 Am. Jur. 2d 111, Amicus Curiae, Sec. 3: ". . . Whatever the matter with reference to which an Amicus Curiae undertakes to inform the court, he should act in good faith, make full disclosure on the point, and suppress nothing. . . ."

An Amicus Curiae comes in presenting himself as a friend of the court to give help to the court to reach a fair and just decision. He is normally not permitted to come in unless he has some interest in the case, but it is necessary for practical reasons as well as the attainment of justice that his interest be fully disclosed.

Northern Securities Company v. United States, 191 U.S. 555; *Universal Oil Products Company v. Root Refining Company*, 328 U.S. 575.

A court can hardly weigh properly the advice and suggestions of an Amicus Curiae without full knowledge of his interest in the outcome of the decision.

Petitioners consented to the BCOA's filing a brief Amicus Curiae, knowing BCOA had a strong interest in the national contracting procedures shown in this record. We do not say BCOA has shown bad faith in its disclosures, but we are disappointed that BCOA has pointedly stopped short of disclosing its full interest in the Protective Wage Clause of the 1958 Amendment (PWC). Its brief, page 5, expressly declines to discuss any of the specific provisions of the national contract including the PWC.

Yet, the PWC is at the heart of this case. The advice and suggestions contained in the BCOA brief, if followed, would unquestionably permit the PWC to be restored to the national contract, (or a similar clause in the national contract of any other union in any industry). We feel that this is a matter of public importance in the economic and social fabric of the country. The decision of the Court on this point will have possible far-reaching and long-lasting importance. The record in this case was made five years ago. We feel that the Court should not give heed to the advice and suggestions of BCOA without further disclosure of facts more fully made of record since the trial of this case in 1965 as to the anticompetitive interest of BCOA and of the other associations that worked with BCOA in the insertion of that clause (and the later 1964 "Eighty Cent Welfare Clause") in the national contract.

If the Court decides to give heed to the advice of BCOA, and in order that the Court may more fully see what this

anticompetitive interest is we attach as an appendix to this brief a "Reference to Some of the Record in Federal Cases after 1965 of the Interest of BCOA and Related Associations in the Protective Wage Clause". This material is attached because it should be considered in the event the Court has been persuaded by some advice or suggestion contained in the BCOA brief filed as Amicus Curiae.

CONCLUSION

For the foregoing reasons Petitioners submit that the advice and suggestions contained in the Brief of Bituminous Coal Operators Association, Amicus Curiae, should not be followed.

Respectfully submitted,

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APPENDIX

REFERENCES TO SOME OF THE RECORD IN FEDERAL CASES AFTER 1965 OF THE INTEREST OF BCOA AND RELATED ASSOCIATIONS IN THE PROTECTIVE WAGE CLAUSE

The NLRB Case 5-CE-6 was filed in 1962 challenging the validity of the boycott provided in Paragraph B of the Protective Wage Clause under the 1959 "Hot Cargo" provision of the Landrum-Griffin Act. While this contest relates only to the boycott provision of Paragraph B, BCOA has taken a very strong interest in sustaining the validity of that part of the Protective Wage Clause. After the decisions of the NLRB (144 NLRB 228, 148 NLRB 249) holding the boycott illegal, the case was appealed to the Court of Appeals for the District of Columbia and the decision of the NLRB was reversed after BCOA filed a brief as Amicus Curiae on the side of the UMW contending for the validity of the boycott in the Protective Wage Clause. *Lewis v. NLRB*, 350 F.2d 801 (1965).

When the case went back to the board and was presented to the trial examiner for a second hearing, the transcript reflects that counsel for BCOA was present contending for the validity of the Protective Wage Clause. After the second hearing the validity of the boycott provision of the Protective Wage Clause was sustained in 179 NLRB No. 80 (1969). The only thing that would prevent the reincorporation of the Protective Wage Clause in the national contract would be a decision adverse to BCOA's position in the case at bar.

The present president of BCOA, Mr. Joseph Moody, has testified as to the anticompetitive interest of the

major coal associations in the promulgation and adoption of the Protective Wage Clause in the bituminous coal industry. This testimony is contained in his deposition on file in the case of ***Blue Diamond Coal Company v. United Mine Workers of America***, referred to in the foregoing brief, a case in the United States District Court for the Eastern District of Tennessee, Northern Division, Civil Docket No. 6189, which was tried in January, 1970. The following matters come from the said deposition and related papers filed in that record.

At the time of the adoption of the Protective Wage Clause in December, 1958, the present head of BCOA, Mr. Moody, was president of Southern Coal Producers Association. Since that time the companies remaining in the Southern Coal Producers Association have joined the BCOA and Mr. Moody has become president of BCOA. As related in the foregoing brief, in 1958 three associations, BCOA, the Southern and Illinois Associations, worked together on the Protective Wage Clause (883a-4a; 942a-4a; 1016a-8a; 1021a; 1028a-9a).

As shown in Southern Coal Producers Association minutes filed in the ***Blue Diamond*** case, Mr. Moody reported to the Board of Directors of Southern Coal Producers Association as to the reason why the Protective Wage Clause was being put into the contract in the following language:

> "In the promulgation of this contract over the years, and especially in the past 10 years, we have established a wage situation whereby most operators and industry as a whole, had to go to general mechanization of their operations because of the very high cost of labor. In so doing, in the case of the coal industry, there was a major decrease in the number of employees and according to the Bureau of Labor Statistics, there was a drop from 400,000 to less than 200,000.

"There has been a major increase in the number of pensioners. Many miners left the coal fields, but many have returned and many never left and so we find a surplus of labor throughout the coal fields. The law of supply and demand took over and we discovered that the labor price established by the contract, was not the price established by the number of miners available for work. This situation encouraged the establishment of mines, not under the union contract. This also presented the Union with a problem, as they found men who were members of the United Mine Workers, effectively opposing interference with their noncontract operations in order to hold their jobs. Therefore, the Union found it was unable to carry out major organizing campaigns. Lastly the coal market was rather seriously weakened as far as price was concerned as there was a premium on non-contract, low-priced coal." (Minutes of the Board of Directors of Southern Coal Producers Association, meeting of December 3, 1958, on file in the Blue Diamond case with the Moody deposition).

At pages 60-61 of his deposition in the *Blue Diamond* case Mr. Moody acknowledged that he talked about the Protective Wage Clause with Mr. Lewis of the union and he testified:

"And I discussed it with Mr. Lewis. He was not very sanguine at the time, mainly because he didn't see just how it could be done.

"Well, I talked to him a couple of times more and said that I thought that it would give a central place of consideration of administration and would be helpful. And I mentioned to him this problem, that my people were becoming very adamant on their demand that

something be done about the non-contract coal. And I don't know the time factors in here, but at another meeting it was talked about and there was one day I was over talking with Mr. Lewis and he showed me two papers which purported to be what we later called a protective wage clause—in other words a protection of the contract operators. One of them was in left field and one of them was in right field. But I did take them and brought them up here—not to this place, but to our counsel——

"MR. POWELL (Counsel for the witness): May I inquire—the two documents you referred to, did Mr. Lewis identify them to you?

"THE WITNESS: The Welly Hopkins [UMW counsel] and the Ed Fox [president of BCOA].

"BY MR. ROUNTREE:

"Q Do you have copies of those documents?

"A No. They probably went with the records.

"Q Can you recall what the basic approach of each one was?

"A Well, the basic approach of each one was the same. It was to work out some method of closer cooperation by contract operators. However, their approach to the thing was wide open and I have forgotten the differences on the thing. That is why I was hesitant about discussing the matter. But I brought it to counsel and asked them, one, for advice of counsel on the legality of such a thing and, two, would they redraft it to see if they could bring up something that was bright-eyed and shiney, because Mr. Lewis said, 'If you have any bright ideas let's see how smart you are.'

My memory is that is what happened. And we brought them back and the protective wage clause that was put into the contract was pretty much what was written in this law office, including the licensing and so forth that went with it."

It is shown in the record in the case at bar that it was Mr. Fox of BCOA, Mr. Moody of Southern Coal Producers Association and Mr. Beebe of the Illinois Coal Operators Association, along with the union officers, Messrs. Lewis, Kennedy and Owens, that made up the joint industry contract committee that policed the industry in the observance of the Protective Wage Clause (878a; 881a; 1018a).

The Court already has a record in a related case that was tried after the case at bar, *United Mine Workers of America v. Tennessee Consolidated Coal Co.*, October Term, 1969, No. 1163, which discloses how closely all these members of the joint industry contract committee worked in going after the companies that did not observe the national contract, and the making of formal determinations and blacklistings against hundreds of companies that refused to send back certifications of compliance with the national contract. The record in that Case No. 1163 of the October 1969 Term, pages 418-9, 423-4, 467-8, 470-1, shows that approximately 1328 coal operators across the country were thus formally determined to be in violation and blacklisted.

When the Landrum-Griffin Act of September, 1959 cast doubt as to the validity of the boycott in Paragraph B of the Protective Wage Clause, the Joint Industry Contract Committee passed a resolution suspending operations and Mr. Moody reported this resolution back to his Board of Directors in Southern Coal Producers Association in the meeting of November 9, 1959 as follows:

"(Mr. Moody read the Resolution) Mr. Moody called attention to the fact that one of the discussions that took place was that the Protective Wage Clause, hereby made inactive, has two sections, Section A. and B. Mr. Moody said that Section A (the Union obligation) was discussed; that Section A does not appear to be affected by the new law as far as could be determined at this time; and that if any ruling under Section A is desired, action can be brought before the committee and the committee will consider it. In other words it is still possible to process a Section A matter and the members of the committee will be available for that consideration." (Parenthetical matter as well as the rest of the quote is part of the minutes of Southern Coal on file in the Blue Diamond case).

However, as shown above, the contest in the NLRB Case 5-CE-6 over the validity of the boycott in Paragraph B of the Protective Wage Clause was long and drawn out.

As stated in the Trial Court's Opinion in this case (104a): "In the 1964 amendment to the National Bituminous Coal Wage Agreement, the Protective Wage Clause was eliminated, or so the union contends. A provision was inserted, however, whereby operators agreed to payment of a welfare fund royalty of eighty cents per ton in lieu of forty cents per ton, upon all coal purchased by the signatory operators that was not produced in compliance with the national contract."

A short time before the foregoing "eighty cent clause" of the April, 1964, amendment was put into the national contract, Mr. Fox (then head of BCOA) wrote a letter to Mr. Hamilton (head of Island Creek Coal Company, the largest company in the Southern Coal Producers Association) in March, 1964 which letter is included in the record

in the above referred to *Blue Diamond Coal Company* case, and that letter reads as follows:

> "Thank you very kindly for your letter of March 10, 1964. The matter of the competition of those in the bituminous industry who are non-signators to the National Bituminous Coal Wage Agreement and thereby not obligated to pay a higher wage scale and the 40¢ royalty has been discussed on many occasions with the United Mine Workers. I hope that my presentations and the presentations of others in the industry to the officials of the United Mine Workers of America will make them appreciate the seriousness of this situation, not only to the coal companies, but to the United Mine Workers of America as well. It is most difficult to meet any demands made by the Mine Workers when there is a lack of opportunity to increase the price of coal to meet these demands."

Most of the foregoing facts are not in the record in the case at bar but come from the records in the Federal cases specified. The purpose for their being offered at this point is to fill in the gap left by the brief of BCOA as Amicus Curiae with respect to full information as to its interest and purposes in intervening in this case to give advice and information to the Court, so that the Court may properly assess the advice and information furnished by the BCOA to the Court as Amicus Curiae.